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No. 21

In the Supreme Court of the United States

OCTOBER TERM, 1944

CAROLENE PRODUCTS COMPANY, A CORPORATION, CHARLES HAUSER, AND WILLIAM H. HARTKE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the circuit court of appeals (R. 285–295) is reported at 140 F. (2d) 61. The opinion of the district court (R. 36–51) is reported at 51 F. Supp. 675.

JURISDICTION

The judgment of the circuit court of appeals was entered on January 10, 1944 (R. 295). The petition for a writ of certiorari was filed on February 7, 1944, and was granted on April 3, 1944, limited to the first four questions presented by

the petition (R. 1394). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the petitioners' product is "filled milk" within the meaning of the Filled Milk Act (Act of March 4, 1923, c. 262, 42 Stat. 1486; 21 U. S. C. 61–64), and is therefore banned by the Act from shipment in interstate commerce.

2. If so, whether the Act as applied to petitioners' product violates their rights under the due process clause of the Fifth Amendment.

STATUTE INVOLVED

Sections 1, 2, and 3 of the so-called Filled Milk Act (Act of March 4, 1923, c. 262, 42 Stat. 1486–1487; 21 U. S. C. 61, 62, 63) provide in pertinent part as follows:

> SEC. 1. (a) The term "person" includes an individual, partnership, corporation, or association;
>
> * * * * *
>
> (c) The term "filled milk" means any milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated, to which has been added, or which has been blended or compounded with, any fat or oil other than

milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated. This definition shall not include any distinctive proprietary food compound not readily mistaken in taste for milk or cream or for evaporated, condensed, or powdered milk, or cream: *Provided*, That such compound (1) is prepared and designed for feeding infants and young children and customarily used on the order of a physician; (2) is packed in individual cans containing not more than sixteen and one-half ounces and bearing a label in bold type that the content is to be used only for said purpose; (3) is shipped in interstate or foreign commerce exclusively to physicians, wholesale and retail druggists, orphan asylums, child-welfare associations, hospitals, and similar institutions and generally disposed of by them.

SEC. 2. It is hereby declared that filled milk, as herein defined, is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public. It shall be unlawful for any person to manufacture within any Territory or possession, or within the District of Columbia, or to ship or deliver for shipment in interstate or foreign commerce, any filled milk.

SEC. 3. Any person violating any provision of this Act shall upon conviction there-

> of be subject to a fine of not more than $1,000 or imprisonment of not more than one year, or both; * * *. When construing and enforcing the provisions of this Act, the act, omission, or failure of any person acting for or employed by any individual, partnership, corporation, or association, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure, of such individual, partnership, corporation, or association, as well as of such person.

STATEMENT

On October 21, 1942, petitioners were indicted, in the District Court of the United States for the Northern District of West Virginia, on eight counts each charging an interstate shipment of "filled milk" in violation of the Filled Milk Act (R. 1–11). The products shipped were known as "Milnut," "Milnot," and "Carolene." These products are essentially similar; such differences as there are among them[1] are in no way germane to this case; consequently, they are referred to herein, as they are in petitioners' brief, as "Carolene."

Most of the facts were stipulated (R. 31–35, 62–63, 65, 94–95, 99, 100–101, 125–126), and such proof as the Government introduced was not disputed.

[1] "Milnot" and "Carolene" are in fact merely different trade names for the same product (R. 25, 89); "Milnut" differs only in that it contains coconut oil in place of the cottonseed oil used in "Milnot" and "Carolene" (R. 113, 145, 155–156).

Carolene is manufactured as follows: The butterfat is removed from the whole milk and sold as cream or churned into butter (R. 70). To the residual skimmed milk a vegetable oil (coconut or cottonseed oil) amounting to six percent of the finished product, and fish liver oils containing vitamins A and D, are added. The compound is then evaporated to approximately one-half its original volume, and the mixture is homogenized, sealed in 14½-ounce containers, and sterilized. (R. 25, 70–72, 124, 218, 224–226.) The product so prepared is virtually indistinguishable from evaporated whole milk in taste, color, odor, appearance, and consistency, and is packaged in cans of the same size and style as those in which evaporated milk is customarily packaged (R. 101).

Carolene is manufactured by the Litchfield Creamery Company, of which petitioner Carolene Products Company is the sales agent for filled milk products (R. 96, 238). In 1941 the Litchfield Creamery Company manufactured 1,590,000 cases of Carolene for the Carolene Products Company (R. 228); and in the same year the latter company sold 1,480,661 cases, approximately half of which were shipped in interstate commerce (R. 231, 236–237). The shipments charged in the indictment were made by petitioner Carolene Products Company from Warsaw, Indiana, into the Northern District of West Virginia, where inspectors of the Food and Drug Administration

secured samples of each shipment and made analyses thereof (R. 32–33, 100–101). Petitioners Hauser and Hartke were, respectively, at the time of these shipments, the president and vice-president of Carolene Products Company, and both were directors and active in its management (R. 24–25, 65, 87, 88, 93, 107–108, 112–113, 116, 216).

At the trial petitioners sought to show that since 1937 Carolene has been artificially fortified with the essential vitamins A and D which are lost when the butterfat is removed from the whole milk, and that it is now a wholesome, nutritive, and fairly labeled article of food, the full equivalent of evaporated whole milk in content of vitamins A and D. The trial judge allowed petitioners to proffer for the record evidence to this effect (R. 137–214, 241–269), but sustained the Government's objection to such evidence (R. 135) and treated it as legally irrelevant (R. 41–45). Petitioners' position was that Carolene's vitamin fortification and resulting equivalence with evaporated whole milk remove it from the intent and purpose of Congress in adopting the Filled Milk Act in 1923, at which time vitamin science was in its infancy and the replacement of lost vitamins by artificial means was not regarded as commercially practicable; that therefore the Act should be construed to be inapplicable to the new fortified Carolene; and that if construed to apply to the new fortified Carolene the Act is invalid

under the due process clause of the Fifth Amendment (R. 12–19, 133–137; cf. R. 41). Petitioners also contended that Carolene is not "in imitation or semblance of milk," within the meaning of these words as used in the Act, for the reason that its characteristics are the natural result of the ingredients and process of manufacture, nothing being added or removed for the purpose of disguising it (R. 16, 28).[2]

A jury was waived (see R. 52), and each petitioner was found guilty by the trial judge on all counts (R. 52–53). The corporate petitioner was sentenced to fines totalling $8,000 (R. 54); and the individual petitioners were each sentenced to fines totalling $8,000 and to imprisonment totalling one year, and were placed on probation for a period of two years commencing upon the expiration of their prison sentences (R. 56–60). Upon appeal to the Circuit Court of Appeals for the Fourth Circuit, the judgments of conviction were affirmed (R. 285–295), the circuit court of appeals stating (R. 290–291): "The fact that the inclusion of Carolene within the ambit of the statute leads to a seemingly harsh and inequitable result does not justify our giving to the statute the restrictive construction for which the defend-

[2] Certain additional defenses offered by the individual petitioners were excluded from consideration here by the terms of the order of this Court granting the petition for certiorari (R. 1394).

ants contend. This matter is one for the consideration of the legislature and not the courts. * * * Our notion of expediency and propriety may not be substituted for the considered will of Congress, expressed in the clear and unambiguous terms of the Act. * * * The power of the legislature cannot be denied merely because an innocent article may conceivably fall within the class prohibited by the statute. * * * Congress may with constitutional impunity bar from interstate commerce goods which may be the subject of a fraudulent sale, although the goods themselves may not be injurious."

SUMMARY OF ARGUMENT

The federal Filled Milk Act, prohibiting the interstate shipment of filled milk, supplements laws in more than three-quarters of the states either prohibiting or rigidly regulating its manufacture and sale. The constitutionality of state legislation of this character was upheld by this Court in 1919, in *Hebe Co.* v. *Shaw*, 248 U. S. 297, and the federal Act has been held by this Court to be constitutional on its face in *United States* v. *Carolene Products Co.*, 304 U. S. 144. The federal Act was based upon an extensive and independent legislative investigation at which evidence was presented which fully justified the legislative judgment, expressed in Section 2 of the Act, that filled milk is "an adulterated article of food, injurious to the public health, and its sale constitutes a

fraud upon the public." While prior to this Court's decision in the earlier *Carolene Products* case three state courts invalidated their state filled milk acts as lacking in due process, the laws of eight other states have been upheld. The petitioners, while conceding as they must the binding force of this Court's decision in 304 U. S. 144 upholding the constitutionality of the Act on its face, and its application to their product as then constituted, nevertheless contend that they were entitled to show by evidence at their trial in this case that since 1937 their product has been fortified by the addition of vitamins A and D theretofore lacking, and that upon such a showing they were entitled to a holding that the Act does not apply to their product, or, as an alternative, that the Act as applied to their product deprives them of due process in violation of the Fifth Amendment.

I

The Act applies to Carolene.

1. The language of the Act is unambiguous, and the undisputed evidence shows that Carolene falls squarely within the Act's prohibitions. While it is true that, according to petitioners' proffered evidence, the vitamin deficiency which was among the reasons for the congressional proscription of filled milk has now been remedied in the case of Carolene, vitamin deficiency was but one of the reasons impelling the adoption of the Act. At least equally

important was the desire to protect the public interest against economic adulteration of a well-known and widely used food product. Petitioners' proffered evidence has no tendency to show that this economic adulteration is any less present in Carolene as now constituted. There is therefore no room for application of the doctrine expressed in *Holy Trinity Church* v. *United States*, 143 U. S. 457, and other cases, under which a statute is construed as not covering objects within its letter when it is plain that the legislature did not intend, or could not reasonably be supposed to have intended, to cover them.

2. Petitioners contend that filled milk is within the prohibition of the Act only when its "imitation or semblance of milk" is the designed result of ingredients added for the purpose of producing such imitation or semblance, and that therefore Carolene is not within the prohibition of the Act. The argument, as one of construction, is totally without merit, inasmuch as Carolene was identified by name in the committee reports recommending passage of the Act, and the only subsequent change shown to have been made in its constitution—the addition of vitamins—is not claimed in any way to have altered the physical resemblance of Carolene to milk. Moreover, the question must be deemed concluded by the opinion of this Court in the earlier *Carolene Products* case, 304 U. S. 144.

II

The Act as applied to Carolene is not unconstitutional.

1. In view of this Court's decision in the earlier *Carolene Products* case that the Act is constitutional on its face, the evidence proffered by the petitioners at the trial would have been material only if sufficient conclusively to negative the considerations before Congress and those which the Court has already noticed judicially in sustaining the Act, as well as any other possible reasonable basis for the Act's validity. Inasmuch as the proffered evidence dealt only with the characteristics of the single product Carolene, it was clearly insufficient to establish the general invalidity of the Act. *Powell* v. *Pennsylvania*, 127 U. S. 678.

2. Moreover, petitioners' proffered evidence regarding the vitamin fortification of Carolene, which was the only evidence not dealing with considerations already fully presented to Congress before adoption of the Act, is insufficient to establish that the Act has lost its rational basis as applied to Carolene. A general legislative prohibition resting on a rational basis does not lose its validity merely because it may comprehend within its scope transactions which might separately be regarded as innocuous. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192. The Act, therefore, would be constitutional as applied to Carolene even if regarded solely as a health measure. But the Act

was not designed solely as a health measure. In large part it was designed to eliminate the dangers of fraud, deception, and consumer misunderstanding and confusion which Congress found inherent in the sale of filled milk. These dangers are not reduced, but are rather increased, by vitamin fortification. The purchasers of vitamin-enriched foods have already been found by this Court to be "peculiarly susceptible to dishonest and unfair marketing practices." *Federal Security Adm'r* v. *Quaker Oats Co.*, 318 U. S. 218. The Federal Security Administrator has adopted food identity standards relating to the vitamin enrichment of condensed and evaporated milk similar to the identity standards for farina upheld by this Court in the *Quaker Oats* case. These standards prescribe levels of vitamin fortification which differ materially from the standards followed in the preparation and sale of Carolene. Carolene is an economically adulterated article sold in competition with the natural product which it is designed to imitate, and therefore falls squarely within the rationale of a statute whose general validity has already been upheld by this Court. The views which the petitioners now urge upon the Court were expressed in detail by Mr. Justice Field in his dissenting opinion in *Powell* v. *Pennsylvania*, 127 U. S. 678, 687–699, and were then rejected by the Court. They should be rejected now.

ARGUMENT

Introductory.—Before dealing specifically with the petitioners' contentions as to the inapplicability of the Filled Milk Act to their product, and as to its unconstitutionality if so applied, we set out a brief historical summary which we believe will aid the Court in placing this case in its proper legislative and judicial setting.

The Filled Milk Act was adopted in 1923. At that time eleven states already had rigidly controlled the exploitation of filled milk or forbidden it altogether. Since then the same legislative policy has spread to the point where it covers more than three quarters of the states.[3] This virtual unanimity of legislative policy is evidence of the strongest sort that the prohibition of interstate shipment contained in the federal Act rests not in

[3] In its opinion in *United States* v. *Carolene Products Co.*, 304 U. S. 144, this Court listed (p. 150, fn. 3) the statutes of thirty-eight states which either prohibited the sale of filled milk or subjected its sale to rigid regulation. The statutes of these thirty-eight states have undergone various clarifying amendments and recodifications, but in general are still in effect. To them should be added Kentucky (Rev. Stat. 1942, §§ 217.260–217.270) and Maine (Rev. Stat. 1930, c. 42, § 36); see also Louisiana (Sanitary Code, Ch. V, §§ 5.6–24, 5.67). As shown below (footnote 18, p. 22, *infra*), the statutes of Illinois, Michigan, and Nebraska have been declared unconstitutional. Following the decision in *Carolene Products Co.* v. *Thomson*, 276 Mich. 172 (1936), the Michigan legislature repealed the statute there involved, and adopted a new statute drastically regulating the sale of filled milk (Mich. Laws 1937, No. 83; Stat. Ann. (1943 Supp.), §§ 12.714–12.718).

arbitrary fiat but on widespread conviction that the prohibition is necessary in the public interest. As was said in *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 204–205: "That the opinion is extensively held * * * sufficiently appears from the legislation of other States and the decision of the courts in its construction. * * * We cannot say that there is no basis for this widespread conviction." Cf. also *State ex rel. Carnation M. P. Co.* v. *Emery*, 178 Wis. 147, 155–157 (1922).

Even before the passage of the federal Act the scope of such legislation, and its constitutionality from the point of view of due process, had been before this Court for consideration. In *Hebe Co.* v. *Shaw*, 248 U. S. 297, decided in 1919, this Court had upheld the constitutionality of an Ohio statute which prohibited the sale of condensed milk "unless it has been made from * * * unadulterated * * * milk, from which the cream has not been removed and in which the proportion of milk solids shall be the equivalent of twelve per cent. of milk solids in crude milk, twenty-five per cent. of such solids being fat * * *". The views of the Court on the application of the act to "Hebe," a compound of evaporated skimmed milk conceded to be wholesome and in all respects correctly labeled, were expressed by Mr. Justice Holmes as follows (pp. 302–303):

> It is argued that, as Hebe is a wholesome or not unwholesome product the

statutes should not be construed to prohibit it if such a construction can be avoided, and that it can be avoided by confining the prohibition to sales of condensed milk as such, under the name of condensed milk, as was held with regard to ice cream in *Hutchinson Ice Cream Co.* v. *Iowa*, 242 U. S. 153. But the statute could not direct itself to the product as distinguished from the name more clearly than it does. You are not to make a certain article, whatever you call it, except from certain materials—the object plainly being to secure the presence of the nutritious elements mentioned in the act, *and to save the public from the fraudulent substitution of an inferior product that would be hard to detect.* * * * It seems entirely clear that condensed skimmed milk is forbidden out and out. But if so the statute cannot be avoided by adding a small amount of cocoanut oil. We may assume that the product is improved by the addition, but the body of it still is condensed skimmed milk, *and this improvement consists merely in making the cheaper and forbidden substance more like the dearer and better one and thus at the same time more available for a fraudulent substitute.* It is true that so far as the question of fraud is concerned the label on the plaintiffs' cans tells the truth—but the consumer in many cases never sees it. Moreover, when the label tells the public to use Hebe for purposes to which condensed milk is applied and states of what

Hebe is made, it more than half recognizes the plain fact that Hebe is nothing but condensed milk of a cheaper sort.

We are satisfied that the statute as construed by us is not invalidated by the Fourteenth Amendment. The purposes to secure a certain minimum of nutritive elements and to prevent fraud may be carried out in this way even though condensed skimmed milk and Hebe both should be admitted to be wholesome. The power of the legislature "is not to be denied simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192, 204. [Italics supplied.][1]

The federal Act, adopted by a Congress familiar with these views of the Supreme Court (cf. R. 597–598, 1309), was based upon an extensive and independent legislative investigation. Hearings were held before the Committee on Agriculture of the House of Representatives from June 13, 1921, to July 20, 1921, and before the Senate Committee on Agriculture and Forestry from

[1] A dissent by Mr. Justice Day, with whom Mr. Justice Van Devanter and Mr. Justice Brandeis joined, urged a construction of the statute which would exclude "Hebe" from its operation.

June 30, 1922, to August 7, 1922.[5] Among the witnesses who testified in support of and against the bill before one or both of the Committees, either orally or through the presentation of written statements, were scientists of outstanding reputation and achievement. At the House Committee hearings 12 witnesses appeared in support of the bill and 12 against; at the Senate Committee hearings 27 appeared in support of the bill and 20 against. The conclusion necessarily to be drawn from the evidence adduced at the hearings, viewing it in the light most favorable to the opposition, is that the question whether filled milk should be banned from the channels of interstate commerce, in the interest of health and the prevention of deception, was a debatable one. This Court so held in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154.

The reports of the congressional committees[6] contain clear and detailed findings in support of the conclusion, expressed in Section 2 of the Act

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[5] The House Hearings (H. R. 6215, 67th Cong., 1st sess.) and Senate Hearings (H. R. 8086, 67th Cong., 2d sess.) are printed in the record, at pp. 315–589 and 747–1300, respectively.

[6] The House Committee Report (H. Rep. No. 355, 67th Cong., 1st sess.) and Senate Committee Report (S. Rep. No. 987, 67th Cong., 4th sess.) are printed in the record, at pp. 589–599 and 1301–1311, respectively. Citations to these reports in this brief are to their page numbers as printed in the record, in the following style: H. Rep., R. —; S. Rep., R. —.

(*supra*, p. 3), "that filled milk, as herein defined, is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public." The legislative judgment that filled milk was injurious to the public health was doubtless based in large part upon the fact that most of the vitamin content of whole milk was removed when the butterfat was extracted, and was not replaced by the coconut and cottonseed oil "fillers" by which the residual skimmed milk was converted into "filled" milk.[7] It was also based in part upon the fact that coconut oil was "produced by oriental and other cheap labor and handled in many instances under shockingly insanitary conditions."[8] But the finding that filled milk was injurious to the public health was not the sole basis of the further determination by Congress that its sale was a fraud upon the public. That determination was independently based upon the fact that the virtual identity in

[7] H. Rep., R. 590–591; S. Rep., R. 1305–1306. By its finding of injury to the public health Congress did not have in mind "unwholesomeness" as such, but rather the susceptibility of filled milk to dangerous manufacturing and distributing practices. "There is no claim that the compound in and of itself is unwholesome. If used by the consumer in limited quantities, with an exact knowledge of its deficiencies, and the ability to supply these deficiencies, there would be little harm in its use. But we fear that such a condition does not obtain in practice, and are convinced that the use of the compound, as it is and will be sold, unless protected, is injurious to the public health." S. Rep., R. 1307.

[8] H. Rep., R. 591.

appearance between filled milk and evaporated whole milk resulted in consumer confusion and misunderstanding whereby a cheaper article was gaining acceptance as the equivalent of a more expensive one, often at the same price—a form of "economic adulteration" later described by this Court as the process by which "less expensive ingredients were substituted, or the proportion of more expensive ingredients diminished, so as to make the product, although not in itself deleterious, inferior to that which the consumer expected to receive when purchasing a product with the name under which it was sold." *Federal Security Adm'r* v. *Quaker Oats Co.*, 318 U. S. 218, 230. Congressman Voigt of Wisconsin, draftsman and sponsor of the bill that became the Filled Milk Act, described filled milk on the floor of the House of Representatives as "a fraudulent product, in that the consumer is not getting what he thinks he is buying" (62 Cong. Rec. 7581; R. 603).

The susceptibility of filled milk to widespread and fraudulent merchandising practices was fully established by the specific findings of the congressional committees. The committees found that the production of filled milk had increased from 14,146,712 pounds in 1916 to 64,893,000 pounds in 1921;* that it could be manufactured for less than half of the cost of evaporated whole

* S. Rep., R. 1303.

milk;[10] that it was an "exact imitation of evaporated milk, in color, consistency, smell, and taste, and the difference between it and evaporated milk can only be ascertained by chemical analysis;"[11] that it "is put up in the same size and style of cans as the genuine evaporated or condensed milk and is carried by the retail dealers on the shelves side by side with the genuine product;"[12] that "in view of the fact that the imitation is perfect, many people buy it in the belief that they are getting full condensed or evaporated milk;"[13] and that, as a result, although the cost of the ingredients of filled milk was less than two cents per one-pound can and its cost to the retailer was three cents per can less than the cost of condensed or evaporated whole milk, it nevertheless was sold by the retailer from ten cents per can up, and often at the same price as that of condensed or evaporated whole milk.[14] It was sold by the retailers as and for, or as the "equivalent" of, genuine condensed or evaporated whole milk.[15]

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[10] Id., ibid.

[11] Id., ibid.; also H. Rep., R. 590.

[12] S. Rep., R. 1304; H. Rep., R. 591.

[13] H. Rep., R. 590.

[14] H. Rep., R. 590-591; S. Rep., R. 1304.

[15] S. Rep., R. 1304; H. Rep., R. 590-591. The House Report pointed out also (R. 591) that a compound of whole milk and coconut fat had been sold for cream, and that a company manufacturing this compound at Pittsburgh had advertised that "we can wholesale our Kream for 100 per cent less than cow's cream and still make a profit of over 100 per cent."

The fact that the compound was sold for the most part in urban sections inhabited by people unable to read labels and of limited means was regarded by Congress as showing that accurate labeling was not of itself a sufficient protection to the public.[16] The House and Senate Committees concurred in the opinion "that the sale of the compound violates the spirit, if not the letter, of the pure food and drugs act."[17] Congressman Voigt stated to the House: "The people who are using coconut oil are using it as a substitute for butter fat in milk. They are not using it except for the purpose of making milk appear as cream, or skimmed milk as evaporated milk." When asked if the proposed bill was "intended to cut off the fraud," he replied: "It is" (62 Cong. Rec. 7582; R. 608).

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[16] H. Rep., R. 591; S. Rep., R. 1304.

[17] H. Rep., R. 592; S. Rep., R. 1304. The House Report further stated (R. 592): "The regulations prescribed by the Department of Agriculture in pursuance to the pure food and drugs act contain the following:

"'Condensed milk, evaporated milk, concentrated milk, is the product resulting from the evaporation of a considerable portion of the water from the whole, fresh, clean, lacteal secretion obtained by the complete milking of one or more healthy cows * * * and contains, all tolerances being allowed for, not less than 25.5 per cent of total solids, and not less than 7.8 per cent of milk fat.'

"No reason is perceived by the committee why an exact imitation of, or substitute for this article should be permitted to be sold to the public which does not meet these requirements."

The constitutionality of the Filled Milk Act, and of many of the comparable state statutes, has frequently been attacked in the courts. In three states the attack has been successful; the statutes of Illinois, Michigan, and Nebraska have each been invalidated as violative of due process.[18] The laws of Wisconsin, Pennsylvania, Maryland, Ohio, Missouri, Kentucky, Florida, and Kansas, on the other hand, have been upheld against such an attack.[19] The federal Act, here involved, has likewise been upheld by the Circuit Court of Appeals for the Seventh Circuit in *Carolene Products Co.* v. *Evaporated Milk Association*, 93 F. (2d) 202,

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[18] *People* v. *Carolene Products Co.*, 345 Ill. 166 (1931), followed in *Carolene Products Co.* v. *McLaughlin*, 365 Ill. 62 (1936); *Carolene Products Co.* v. *Thomson*, 276 Mich. 172 (1936); *Carolene Products Co.* v. *Banning*, 131 Neb. 429 (1936).

[19] *State ex rel. Carnation M. P. Co.* v. *Emery*, 178 Wis. 147 (1922) (see, however, *John F. Jelke Co.* v. *Emery*, 193 Wis. 311 (1927), invalidating the state oleomargarine law); *Carolene Products Co.* v. *Harter*, 329 Pa. 49 (1938); *Reiter* v. *State*, 109 Md. 235 (1909) (by implication); *Hebe Co.* v. *Shaw*, 248 U. S. 297; *Poole & Creber Market Co.* v. *Brisbeays*, 343 Mo. 1133 (1939) (see, however, *State ex inf. McKittrick* v. *Carolene Products Co.*, 346 Mo. 1049 (1940), holding the statute inapplicable to vitamin-fortified Carolene); *Carolene Products Co.* v. *Hanrahan*, 291 Ky. 417 (1941); *Setzer* v. *Mayo*, 150 Fla. 734 (1942); *Carolene Products Co.* v. *Mahler*, 152 Kan. 2 (1940); *State ex rel. Mitchell* v. *Sage Stores Co.*, 157 Kan. 104 (1943), now on certiorari here, No. 34 this Term. An injunction against enforcement of the Georgia statute was denied in *Cox* v. *Linder*, 191 Ga. 790 (1941), although without discussion of the constitutional issue.

and by this Court in *United States* v. *Carolene Products Co.*, 304 U. S. 144.[20]

Petitioners, conceding as they must the binding force of this Court's decision in 304 U. S. 144 upholding the constitutionality of the Act on its face, and its application to their product as then constituted, nevertheless contend that under that opinion they may still show that Carolene as now constituted is no longer the vitamin-deficient product there involved, and that upon such a showing they are entitled to a determination either that the Act is inapplicable to Carolene or, if it is applicable, that as so applied it is unconstitutional.[21] We

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[20] Cf. *United States* v. *Carolene Products Co.*, 104 F. (2d) 969 (C. C. A. 7), affirming the conviction of Carolene Products Company under the indictment upheld by this Court in 304 U. S. 144. Cf. also *Carolene Products Co.* v. *Wallace*, 27 F. Supp. 110, affirmed *per curiam*, 307 U. S. 612, 30 F. Supp. 266, affirmed *per curiam*, 308 U. S. 506, in which a three-judge district court sitting in the District of Columbia declined to enjoin the Secretary of Agriculture from prosecuting Carolene Products Company under the federal Act for sales of the new vitamin-fortified product.

[21] In line with this contention petitioners assert (Br., p. 26) that opinions upholding the constitutionality of filled milk legislation as applied to Carolene prior to its vitamin fortification in 1937 "do not touch the question now presented." While it is true that of the decisions cited in footnote 19, *supra*, as upholding the constitutionality of state filled milk laws, all but four (the Kentucky and Florida and the two Kansas cases) dealt with vitamin-deficient filled milk, it does not follow that the earlier decisions are of no assistance in determining the present controversy, since it is our contention that the addition of vitamins presents no cognizable difference. On the other hand, all of the four

submit that no such limitation or distinction of this Court's opinion in the earlier *Carolene Products* case is warranted, and that the courts below were fully justified in relying on that opinion for the conclusion that the Filled Milk Act has effectively and constitutionally prohibited the shipment of Carolene in interstate commerce regardless of its alleged wholesomeness and equivalence to whole milk in vitamin content. If this view is correct, then plainly no error was committed by the courts below in excluding, as legally irrelevant, petitioners' proffered evidence as to the wholesomeness and vitamin enrichment of their product.[22]

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cases cited by petitioners (Br., p. 29; see footnote 18, *supra*) as rejecting filled milk laws on constitutional grounds were decided before the decision of this Court to the contrary in 304 U. S. 144, and may therefore be regarded as negligible authority.

[22] This statement is not inconsistent with the assumption of this Court in the earlier *Carolene Products* case, 304 U. S. 144, 152, that "a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis." We make the same assumption, but contend that petitioners' proffered evidence does not negative a rational basis for the statute as applied to Carolene, and that therefore it was proper for the district judge, who heard the evidence at length as trier of fact, to order it technically excluded as legally irrelevant. Although the ruling on evidence is assigned by petitioners as a separate ground of error (Pet., p. 6; Br., pp. 5–6), we do not understand them to disagree with our view that that question is merely ancillary to the basic controversy as to the application of the Act to Carolene, and as to its constitutionality if so applied. Petitioners have so treated the question in their brief, and we do likewise herein.

I

THE FILLED MILK ACT APPLIES TO CAROLENE

The petitioners assign two grounds for their contention that as a matter of construction the Filled Milk Act should be held inapplicable to their product as now constituted. First, they assert that the legislative history establishes deficiency in vitamins A and D as the sole evil at which the Act was aimed, and that therefore a product in which this deficiency has been supplied is "not within the rationale of the Act" (Br., p. 7), and hence not within its operation. Second, resorting again to the legislative history, they assert that Congress, in predicating the operation of the Act upon "imitation or semblance of milk," intended to prohibit only products to which ingredients have been added, or from which ingredients have been omitted, "for the purpose of bringing about a simulation" (Br., p. 34); and that the Act is therefore inapplicable to Carolene, whose similarity to milk is "due to the inherent qualities and attributes of the necessary ingredients of the product" (Br., p. 34). We deal with these two arguments of construction separately.

1. *Carolene cannot be excluded from the Act by construction.*—On its face, the Act covers Carolene. The undisputed testimony shows that Carolene is "skimmed milk * * * to which has been added, or which has been blended or compounded with * * * fat or oil other than milk fat, so that the resulting product is in imitation or sem-

blance of milk * * *, whether or not * * * evaporated." This is the language of the Act, and it could not more meticulously describe Carolene. The base of Carolene is skimmed milk. The skimmed milk is blended or compounded with coconut or cottonseed oil. The mixture is evaporated and homogenized. The resulting product is virtually indistinguishable from evaporated whole milk in taste, color, odor, appearance, and consistency. These facts are not disputed (R. 101). They bring Carolene within the operation of the Act.

The petitioners, however, seek to invoke the doctrine, most prominently announced by this Court in *Holy Trinity Church* v. *United States*, 143 U. S. 457, that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers" (143 U. S. at 459). The soundness of the doctrine is, of course, beyond dispute. As a matter of construction, courts will not give to general words in a statute a meaning which in particular application will produce a result which the legislature could not reasonably be supposed to have intended, or which the context or history of the legislation show clearly the legislature did not intend.[23]

[23] Cf. the conclusion of this Court in the *Holy Trinity Church* case, 143 U. S. 457, 472, that the statute there involved did not apply to "cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against."

But here we are not dealing with general words, nor with words which, to cover Carolene, must be given an application which Congress could not reasonably be supposed to have intended. We are dealing with a statute which, like that involved in *Hebe Co.* v. *Shaw*, 248 U. S. 297, 302, "could not direct itself to the product as distinguished from the name more clearly than it does." Here there is no room even for the argument of the minority in the *Hebe* case, predicated upon the apparent preoccupation of the Ohio statute with "condensed milk" sold as such; for here the Act describes with precision the exact product which Carolene is shown by the evidence to be. The Act leaves no leeway for exclusion of Carolene, even though it were established that Carolene as now constituted is free of the defects which motivated the passage of the Act in the first instance. The reasonable and articulately expressed legislative judgment that certain products as a class afford sufficient danger of injury "to the public health, morals or welfare" (*United States* v. *Carolene Products Co.*, 304 U. S. 144, 147) to call for their general proscription is not to be frustrated by a showing that in a particular case an individual product clearly within that class may be free of the dangers at which the legislation is aimed. The doctrine of the *Holy Trinity Church* case, *supra*, requires no such piecemeal enforcement of remedial legislation.

Moreover, the premise of petitioners' argument is faulty. It may be conceded that Carolene, by the new process of fortification, now contains vitamins A and D to a point equalling or exceeding that of whole milk. But as shown above, pp. 17–21, Congress was not alone concerned with deficiency in these vitamins. Congress was dealing with a substitute compound the very nature of which was such as to lead the ignorant or the unthinking into believing that they were getting something that they were not. Danger of vitamin deficiency was one consideration; fear of unsanitary conditions of manufacture was another; protection against economic adulteration and deception was another. In the language of this Court in the *Hebe* case, 248 U. S. 297, 303, "We may assume that the product is improved by the addition, but the body of it still is condensed skimmed milk, and this improvement consists merely in making the cheaper and forbidden substance more like the dearer and better one, and thus at the same time more available for a fraudulent substitute."[24]

Carolene can be excluded from the operation of the Act only if this Court can say that no ground can suggest itself to a rational mind for assuming that Congress intended the specific language

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[24] Mr. Justice Holmes was, of course, discussing addition of the coconut oil "filler", rather than the vitamin enrichment here involved; but his general principle—which might be expressed as "the closer the imitation the greater the opportunity for fraud"—is no less applicable here.

of the Act to cover filled milk products irrespective of vitamin enrichment. We submit that the Court cannot so conclude. The judgment which Congress was called upon to make was a legislative judgment as to the best means of protecting the public against a compound which, as the legislative history copiously shows, was instinct with opportunities for deception and damage to the public health and welfare. The judgment of Congress, expressed unambiguously in the Act, was that the needed public protection could be secured only by outright prohibition of filled milk.[25] Regardless of

[25] It is worthy of note that in the final stages of debate on the bill in the Senate Senator Stanley of Kentucky proposed an amendment which would have limited its operation to "any filled milk which is deleterious or contains any deleterious constituents." The amendment was defeated, and in its place the Senate adopted a committee amendment embodying the present declaration of Section 2 of the Act that filled milk "is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public." R. 1378–1383, 1391–1393.

Cf. *Reiter* v. *State*, 109 Md. 235, 240 (1909): "If the language of the Act is broad enough to include condensed skimmed milk, there is no force in the contention that the Legislature could not have intended the Act to apply to condensed skimmed milk simply because it is an article of food not then known, as the Legislature may unwittingly have prohibited the sale of an article of which it had no knowledge, *or have purposely included in the prohibition an article known to it, but as to the value of which as an article of food, it was not then fully advised.*" [Italics supplied.] Cf. also *Browder* v. *United States*, 312 U. S. 335, 339–340: "Old laws apply to changed situations. The reach of the act is not sustained or opposed by the fact that it is sought to

constitutional issues which might be raised by the judgment, and which we discuss below, we submit that that was beyond doubt the judgment of Congress, and that the Act leaves no room for the creation of implied exceptions by judicial construction.[38]

2. *Carolene is "in imitation or semblance of milk."*—Petitioners' second argument of construc-

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bring new situations under its terms. While a statute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within its scope." [Footnotes omitted.]

[38] Such an implied judicial exception was created by the Supreme Court of Missouri in *State ex inf. McKittrick* v. *Carolene Products Co.*, 346 Mo. 1049 (1940), where, in a decision on the pleadings, the court dismissed a *quo warranto* proceeding on the ground that Carolene products were wholesome and nutritious, were not "sold * * * in imitation or semblance of milk," and "are a unique cooking compound and are not sold as and for evaporated milk." The decision has not been followed elsewhere: "We are not in accord with that holding since, under the Act, the question is not whether the resulting product is *sold* in semblance of milk, but only whether it *is* in semblance thereof. It is not a question of whether a fraud is actually committed—**the Act is aimed at** a product possessing characteristics containing **the potentialities** of fraudulent use and resulting damage to public health." *Carolene Products Co.* v. *Hanrahan*, 291 Ky. 417, 426 (1942). The comment of the Kentucky court applies *a fortiori* to the federal Act, which does not in terms purport to cover sales, but only shipments in interstate commerce. Obviously, the illegality of a shipment could not be intended by Congress to depend on the characteristics of a specific subsequent sale. Cf. also *Carolene Products Co.* v. *Thomson*, 276 Mich. 172, 177–178 (1936), where the Michigan act was upheld in its application to Carolene even though such application, in view of Carolene's wholesome character, was held to render the act unconstitutional.

tion, to which Point III of their brief is devoted, is, we submit, totally lacking in merit. The argument, briefly stated, is that the phrase "imitation or semblance of milk" in the Act was drawn from the model of the New York filled milk statute (N. Y. Agricultural Law, § 44; now N. Y. Agriculture and Markets Law, § 64); that the same words as used elsewhere in the New York statutes had been construed by the New York courts to cover only a "conscious, designed and intentional imitation," due to "the incorporation in the product of an ingredient placed there solely for the purpose of causing it to resemble the real article"; that this construction of the New York statute had been made known to the Senate Committee which considered the federal Act; and that therefore Congress must be presumed to have intended to adopt not only the language of the New York statute, but also the construction theretofore accorded to that language by the New York courts.[*]

Ordinarily much weight may doubtless be given to prior judicial constructions of language selected by the legislature from preexisting statutory models. But the principle is no more than one of a number of convenient aids in determining legislative intent. It must yield to any clearer and more specific available indications of what the legis-

[*] Petitioners seek to draw a similar, though somewhat weaker, influence from earlier judicial constructions of the federal oleomargarine tax statute, 24 Stat. 209.

lature meant. Here, we have the clearest and most specific indication of legislative intent which could possibly be found: Congress, when through its committee reports it explained what it meant to cover by the Act, explained specifically that it meant to cover Carolene—not Carolene by some general description of characteristics, but Carolene by name.

The petitioners would thus have the Court hold that Congress, though purporting to adopt a statute barring Carolene, as such, from shipment in interstate commerce, at the same time intended to except, from its actual operation any product whose "imitation or semblance" of milk was of the "inherent" character claimed for Carolene—and therefore to exempt Carolene itself. The argument carries its refutation on its face. Nor is the argument made any more plausible by pointing out that the "new Carolene" is not the same as the "Carolene" referred to in the committee reports. Vitamins have been added, it is true, but petitioners do not suggest that the addition of vitamins in any way changes the taste, odor, appearance, or texture of the product.[29] So far as the record shows, since the passage of the

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[28] H. Rep., R. 591; S. Rep., R. 1304.

[29] Petitioners' expert witness Howard J. Cannon testified that "a very minute amount of the oil is added per can of milk * * * about 1-25th of one gram", and that "the presence of the fish liver oil in the finished product is not detectable by taste or smell" (R. 157–158).

Act no change has been made in the composition of Carolene other than the change of vitamin fortification, which has no bearing on Carolene's "imitation or semblance of milk." [30] If Carolene was in "imitation or semblance" of milk in 1923, it is so still.[31]

II

THE FILLED MILK ACT AS APPLIED TO CAROLENE IS NOT UNCONSTITUTIONAL

The validity of the Filled Milk Act on its face, as applied to filled milk generally, was sustained in *United States* v. *Carolene Products Co.*, 304 U. S. 144, on an appeal by the United States from an order sustaining a demurrer to an indictment under the Act. This Court there said (pp. 153–154):

> Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may

[30] In terms of "imitation or semblance", indeed, the only effect of the addition is to make Carolene more like milk, in that it supplies an element present in milk but previously lacking in Carolene.

[31] The question whether the earlier Carolene met the statutory test of "imitation or semblance" was raised and decided against the petitioners in the trial of the corporate defendant on the indictment upheld by this Court in 304 U. S. On appeal from the conviction of Carolene Products Company under that indictment, the court concluded: "From these uncontradicted facts a court or a jury would, of necessity, find that 'Milnut' was intended to simulate milk." *United States* v. *Carolene Products Co.*, 104 F. (2d) 969, 970 (C. C. A. 7).

properly be made the subject of judicial inquiry. *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543. Similarly we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 349, 351, 352; see *Whitney* v. *California*, 274 U. S. 357, 379; cf. *Morf* v. *Bingaman*, 298 U. S. 407, 413, though the effect of such proof depends on the relevant circumstances of each case, as for example the administrative difficulty of excluding the article from the regulated class. *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 511–512; *South Carolina* v. *Barnwell Bros.*, 303 U. S. 177, 192–193. But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations

> presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it. *Price* v. *Illinois*, 238 U. S. 446, 452; *Hebe Co.* v. *Shaw*, [248 U. S. 297], *supra*, 303; *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 584; *South Carolina* v. *Barnwell Bros., Inc.*, *supra*, 191, citing *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 299.

The petitioners rely (Br., pp. 21–22) upon the first sentence of the foregoing excerpt to support their contention that upon a showing of the vitamin enrichment of their product, by a process not known to Congress when the Act was passed in 1923, they were entitled to a holding that the Act as applied to them had ceased to be constitutional. We do not believe that the quoted language bears the construction which petitioners place on it. As we understand the passage as a whole, this Court intended no intimation that either in the case then before it or in future cases a defendant could avoid the operation of the Act by showing the meritorious qualities of his particular product. Rather, the Court was differentiating the case before it from *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, in which it had declined

to pass upon the constitutionality of a statute in the absence of a record containing specific evidence concerning the industry affected. In the *Carolene Products* case, by contrast, the Court found that adequate basis for a constitutional determination was supplied by "the considerations presented to Congress, and those of which we may take judicial notice". From such considerations the Court concluded that the question whether commerce in filled milk should be prohibited altogether was "debatable", and that therefore the judgment of Congress could not be superseded by a finding of a court or verdict of a jury as to the reasonableness of the prohibition, either generally or in particular instances.[32]

[32] In accord with our interpretation of the language quoted from this Court's earlier *Carolene Products* decision, see *Carolene Products Co.* v. *Hanrahan*, 291 Ky. 417, 423–424 (1941): "Appellant seizes on the first sentence of the quoted language as indicative of its right to have a judicial inquiry as to the existence of a rational basis for the Act and contends that the facts alleged in the petition, admitted true on demurrer, negative the existence of such a rational basis. But this contention does not give due consideration to the subsequent language narrowly circumscribing the scope of judicial inquiry as to a rational basis. It is apparent that the Supreme Court in that opinion took into consideration such arguments against the constitutionality of the Act as could be based on any and all facts alleged in the petition in this case. That decision is conclusive on the question of constitutionality of the Act in so far as the federal question is concerned and the fact that since the decision appellant has added vitamins to its product and that there has been no congressional or legislative investigation or report on the subject in no way detracts from its binding effect, for the

Concededly the evidence now proffered by petitioners adduces considerations which might have been relevant to the original congressional investigation of the filled milk problem. Petitioners would have this Court say that if Congress had known the facts now presented it would not, and could not rationally, have enacted the Filled Milk Act. To a large extent the evidence now proffered, as to Carolene's wholesomeness, absence of deleterious ingredients, and general value as a food, is merely cumulative, and can hardly render the issue less "debatable" than it has already been held by this Court to be. To that extent, there is no merit in petitioners' claim that in the light of their evidence the Act has lost its rational basis. To the extent that their evidence goes further and tends to establish relevant facts not known and not available to Congress when it adopted the Act, its materiality depends upon whether it is suf-

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addition of the vitamins has the effect only of making its product more wholesome and nutritive and the wholesome and nutritive character of the product was assumed by the Supreme Court when the decision was reached." See also *Carolene Products Co.* v. *Wallace*, 27 F. Supp. 110, 112-113 (D. D. C.), affirmed *per curiam*, 307 U. S. 612, 30 F. Supp. 266, 267, affirmed *per curiam*, 308 U. S. 506; compare *Setzer* v. *Mayo*, 150 Fla. 734 (1942).

As the district court in the present case observed (R. 44), "Mr. Justice Butler must have felt that the majority opinion of the Court was deciding that such questions could not be raised as a defense, else there would have been no occasion for filing a separate though concurring opinion [304 U. S. at 155]."

ficient conclusively to negative the considerations before Congress and those which the Court has already noticed judicially in sustaining the Act, as well as any other possible reasonable basis for the Act's validity. We submit that petitioners' proffered evidence requires no such conclusion by this Court, either with respect to the Act's validity as applied to filled milk generally, or with respect to its particular application to Carolene.

1. *Petitioners' proffered evidence does not establish the general invalidity of the Act.*—In the earlier *Carolene Products* case the Filled Milk Act was sustained as a valid exercise of the "power of the legislature to secure a minimum of particular nutritive elements in a widely used article of food and to protect the public from fraudulent substitutions" (304 U. S. at 148). This Court found that the evidence before the congressional committees amply supported their conclusions "that the use of filled milk as a substitute for pure milk is generally injurious to health and facilitates fraud on the public" and "that the danger is greatly enhanced where an inferior product, like appellee's, is indistinguishable from a valuable food of almost universal use, thus making fraudulent distribution easy and protection of the consumer difficult" (304 U. S. at 149–150).

In the present case petitioners' proffered evidence of vitamin fortification to a point of equivalence with milk relates only to Carolene. It does not show whether Carolene comprises a large or a

small proportion of the filled milk manufactured and sold throughout the country. It does not show whether filled milk generally, or even a major portion thereof, is similarly fortified with vitamins so as to be the equivalent of whole milk in vitamin content and food value. It falls far short, therefor, of establishing the absence of a rational basis for the statute, even if we assume *arguendo* that its only rational basis is the promotion of the public health. (*Powell* v. *Pennsylvania*, 127 U. S. 678, is directly in point. There a Pennsylvania statute prohibited the manufacture and sale of any article, designed to take the place of butter or cheese, "out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or of cream from the same." In the prosecution for the sale by the defendant of two packages of oleomargarine, the state court excluded the defendant's proffered evidence that the oleomargarine in question "was a wholesome and nutritious article of food, in all respects as wholesome as butter produced from pure unadulterated milk or cream from unadulterated milk" (127 U. S. at 682). This Court, in sustaining the constitutionality of the statute, held that the rejection of the proffered evidence was proper, saying (127 U. S. at 684): "It will be observed that the offer in the court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were, in fact, wholesome or nutritious articles of

food. It is entirely consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from anything of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that such is the fact."

The present case is even stronger, for here a similar assumption as to the harmful characteristics of filled milk generally is buttressed by specific findings by Congress, which have already been held by this Court to be amply supported by the evidence on which Congress acted. Even if the Filled Milk Act be viewed purely as a health measure, therefore, the proffered evidence by no means establishes its lack of rational basis. Moreover, the Act was neither adopted by Congress nor sustained by this Court as a purely health measure, but as one also designed to protect against deception, fraud, and consumer confusion and misunderstanding. In this area, with which we deal more fully below, the insufficiency of the evidence to negative the reasonableness of the Act is even more patent.

2. *Petitioners' proffered evidence does not establish the invalidity of the Act as applied to Carolene.*—It is, of course, "well established that, when a State exerting its recognized authority un-

dertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government." *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201. Assuming, as we have endeavored to show (*supra*, pp. 38–40), that the considerations which led this Court to uphold the validity of the Filled Milk Act on its face are in no material respects negatived by petitioners' proffered evidence, we submit that the doctrine of the *Purity Extract* case is determinative here, even though petitioners may, by improvements in manufacture, have eliminated in Carolene the evils and dangers at which the legislation was aimed. The evidence affords no warrant, we believe, for judicial questioning of the congressional judgment that adequate protection of the public health against the dangers of filled milk requires outright prohibition of the product as a whole.[30]

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[30] In Point I, our reply to petitioners' arguments of construction, we have set forth (*supra*, pp. 25–30) our reasons for believing that as a matter of interpretation the Act covers Carolene regardless of its alleged vitamin enrichment. Our reasons for believing that Congress intended to cover Carolene regardless of vitamin enrichment apply with equal force to our contention that Congress could constitutionally do so.

But we do not rest on this doctrine alone. Even assuming the truth of all petitioners' proffered evidence as to the wholesomeness and nutritious character of their product, we believe that a rational basis for the application of the Act to Carolene is to be found in the congressional purpose to prevent consumer deception, confusion and misunderstanding.[1]

State statutes prohibiting or drastically restricting the manufacture and sale of oleomargarine have long been sustained upon such a basis. Oleomargarine, like Carolene, is a compound consisting principally of skimmed milk and coconut or cottonseed oil. In sustaining a Pennsylvania statute which prohibited and punished by fine and imprisonment the manufacture and sale of any substitute for butter made "out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or of cream from the same," the court in *Powell v. Commonwealth*, 114 Pa. 265, 295–296 (1886), stated:

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[1] Strictly, of course, in view of the presumption of constitutionality, the test is whether the Court can say affirmatively that no "state of facts either known or which could reasonably be assumed affords support" for the legislative judgment. *United States v. Carolene Products Co.*, 304 U. S. 144, 154. However, as the Court did in that case, we go further and discuss the affirmative evidence which was before Congress and which tends to support rather than weaken the reasonableness of its judgment.

> The test of the reasonableness of a police regulation, prohibiting the making and vending of a particular article of food, is not alone whether it is in part unwholesome and injurious. If an article of food is of such a character that few persons will eat it knowing its real character; if, at the same time, it is of such a nature that it can be imposed upon the public as an article of food which is in common use, and against which there is no prejudice; and if, in addition to this, there is probable ground for believing that the only way to prevent the public from being defrauded into the purchasing of the counterfeit article for the genuine is to prohibit altogether the manufacture and sale of the former,—then we think such a prohibition may stand as a reasonable police regulation, although the article prohibited is in fact innocuous, and although its production might be found beneficial to the public, if in buying it they could distinguish it from the production of which it is the imitation.

The decision of the state court was upheld by this Court in *Powell* v. *Pennsylvania*, 127 U. S. 678. In a dissenting opinion, Mr. Justice Field anticipated virtually every objection now raised to the validity of the Filled Milk Act. The same Pennsylvania statute was later, in *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, held unconstitutional under the commerce clause "to the extent that it prohibits the introduction of oleomargarine from

another State and its sale in the original package" (171 U. S. at 25). In *John F. Jelke Co. v. Emery*, 193 Wis. 311, 318–322 (1927), it is stated that the *Schollenberger* case in effect overruled the *Powell* case; but this Court did not think so. It expressly distinguished the commerce question presented by the *Schollenberger* case from the due process question in the *Powell* case, saying:

> * * * Legislation which has its effect wholly within the State and upon products manufactured and sold therein might be held valid as not in violation of any provision of the Federal Constitution, when at the same time legislation directed towards prohibiting the importation within the State of the same article manufactured outside of its limits might be regarded as illegal because in violation of the rights of citizens of other States arising under the commerce clause of that instrument. (171 U. S. at 16.)[35]

The *Powell* case has never been overruled, and was cited as authoritative in *United States v. Carolene Products Co.*, 304 U. S. 144, 151. Nu-

[35] Moreover, in *Plumley v. Massachusetts*, 155 U. S. 461, this Court upheld even as against an attack on the commerce ground a Massachusetts oleomargarine statute applicable only to products "in imitation of yellow butter"; the power of the states thus to prevent deception was held in the *Schollenberger* case (171 U. S. at 17) to distinguish the Massachusetts statute from the Pennsylvania statute involved in the *Powell* and *Schollenberger* cases.

merous state oleomargarine statutes have been sustained by the state courts on the same basis.*

And on the same basis, whether Carolene is as wholesome and nutritious as condensed or evaporated whole milk is unimportant, so long as it is susceptible of being used as an instrument of fraud, deception, or consumer misunderstanding and confusion. Petitioners' proffered evidence in the present case does not in any way refute the assertion

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* *People* v. *Arensberg*, 105 N. Y. 123, 129 (1887): "Assuming, as is claimed, that butter made from animal fat or oil is as wholesome, nutritious and suitable for food as dairy butter; * * * yet it cannot be claimed * * * that it is beyond the power of the legislature to enact such laws as they may deem necessary, to prevent the simulated article being put upon the market in such a form and manner as to be calculated to deceive. * * * It may be butter, but it is not butter made from cream, *and the difference in cost or market value, if no other, would make it a fraud to pass off one article for the other*" [italics supplied]; *State* v. *Marshall*, 64 N. H. 549, 552 (1888): "The prohibition of the statute being directed against imposition in selling or exposing for sale artificial compounds resembling butter in appearance and flavor, and liable to be mistaken for genuine butter, it is no defence that the article sold or exposed for sale is free from impurity and unwholesome ingredients, and healthy and nutritious as an article of food"; *Waterbury* v. *Newton*, 50 N. J. L. (21 Vroom) 534, 537, 538 (1888): "That the legislature may repress such counterfeits does not admit, I think, of substantial question"; *McAllister* v. *Maryland*, 72 Md. 390, 391-392 (1890); *State* v. *Addington*, 77 Mo. 110, 116-118 (1882) (evidence of wholesomeness of oleomargarine rejected); *State* v. *Myers*, 42 W. Va. 822, 824-827 (1896).

In *Carolene Products Co.* v. *Hatter*, 329 Pa. 49, 53, (1938), *Powell* v. *Pennsylvania*, 127 U. S. 678, was held determinative of the validity of the state filled milk act.

by the draftsman of the Filled Milk Act (Congressman Voigt of Wisconsin) that the only purpose of the addition of a vegetable oil is that "of making milk appear as cream, or skimmed milk as evaporated milk" (62 Cong. Rec. 7582, R. 608; see *supra*, p. 21). It does not in any way refute the findings of the congressional committees that "in view of the fact that the imitation is perfect, many people buy [filled milk] in the belief that they are getting full condensed or evaporated milk" (H. Rep., R. 590), that although its cost is much less it is sold by retailers as and for the genuine article, often at the same and sometimes at a higher price, and that accurate labeling has not provided a sufficient safeguard against public deception, confusion, and misunderstanding.* The evidence of record in *Sage Stores Co.* v. *State of Kansas*, now pending in this Court on certiorari, No. 34 this Term, shows affirmatively that all of these considerations on the basis of which Congress acted in 1923 still obtain in the sale of Carolene.**

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* These findings are set forth more fully *supra*, at pp. 17-21. See also S. Rep., R. 1306: "Your committee is of the opinion that it is impossible to prevent fraudulent use and sale of this compound, on account of the incentive of additional profit held out to the retail dealers, and no doubt in many cases due to the fact that the retailers themselves do not know wherein the compound differs from the genuine evaporated milk."

** Whether or not judicial notice may properly be taken of the evidence in the record in the *Sage Stores Co.* case for the purpose of determining the merits of Carolene as a food

The danger of confusion in the public mind between it and condensed or evaporated whole milk is in fact apparent from the label used on the product (incorporated in the plea in abatement, R. 17), bearing prominently the legend "It whips", and displaying designs which to all appearances are of whipped cream on gelatin and a refrigerator tray of ice cream. Such danger of confusion and of deception and fraud is in no way avoided or mitigated by the product's artificial vitamin fortification to the point of equivalence to milk. For this in no way changes the appearance of the product, or causes it to be any the less in imitation or semblance of milk. While we may assume, *arguendo*, that it assures to the consumer just as good a product,[*] it does not assure

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product, it would seem clear that the Court may properly consider such evidence as an aid to deciding "whether it is possible to say that the legislative choice is without rational basis." *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 191–192.

[*] That this assumption is not warranted in fact is demonstrated by the evidence of record in the *Sage Stores Co.* case, No. 34 this Term. After exhaustive review of the evidence in that case the Commissioner of the Kansas Supreme Court made the following finding (Record in No. 34, pp. 700–701):

"Defendant's product is wholesome, nutritious and harmless, in the sense that it contains nothing of a toxic nature; but it is inferior to evaporated whole milk in the content of fatty acids, phospholipins, sterols and Vitamins E and K, all of which are essential in human nutrition, with the probable exception of Vitamin E in the diet of infants. In addition, evaporated whole milk contains a superior growth-

to him a product of the composition that he may reasonably expect to receive. It "consists merely in making the cheaper and forbidden substance more like the dearer" (*Hebe Co. v. Shaw*, 248 U. S. 297, 303) and thus more readily available for palming off as an unwanted substitute; and "the difference in cost or market-value, if no other, would make it a fraud to pass off one article for the other." *People v. Aronsberg*, 105 N. Y. 123, 129 (1887).

This Court has already recognized that purchasers of vitamin-enriched foods "are peculiarly susceptible to dishonest and unfair marketing practices." *Federal Security Adm'r v. Quaker Oats Co.*, 318 U. S. 218, 229. In that case the Court sustained food-identity standards for farina and enriched farina which had the effect of banning from the market a perfectly whole-

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promoting property, found in butterfat and not in cottonseed oil, essential to the optimum growth of infants.

"These deficiencies in defendant's product, as compared to evaporated whole milk, are largely made up from other sources when the product is used as a substitute for whole milk or evaporated whole milk in the diet of adults who consume a varied diet. When defendant's product is used as a substitute for whole milk or evaporated whole milk in the diet of infants and children who do not consume a varied diet, such deficiencies are not made up, and the diet is partially inadequate. Defendant's product does 'get into the channels of infant nutrition.'"

Upon exception by the defendants, the Kansas Supreme Court explicitly affirmed this finding as being supported by competent evidence in the record (Record in No. 34, p. 659).

some and well known farina product solely by reason of the fact that it was artificially enriched in a manner not authorized by the applicable standards.[41] Similar identity standards have been established for condensed and evaporated milk.[42] These standards do not require artificial enrichment with vitamin D, and permit it only upon specified conditions. If vitamin D is added, the words "With Increased Vitamin D Content" or "Vitamin D Content Increased" must appear on the label,[43] and the enrichment must be "in such quantity as increases the total vitamin D content to not less than 7.5 U. S. P. units per avoirdupois ounce" of the finished product, provided further that the vitamin D content may be increased "by the addition of a concentrate of vitamin D (with any accompanying vitamin A when such vitamin D in such concentrate is obtained from natural sources) dissolved in a food oil; but if such oil

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[41] The respondent's product was "Quaker Farina Wheat Cereal Enriched with Vitamin D." It was recognized that by virtue of the standards this product could no longer be marketed as "farina," since the presence of vitamin D precluded conformity with the "farina" standard; likewise, it could not be marketed as "enriched farina" unless the respondent added the minimum quantities of vitamin B, riboflavin, nicotinic acid, and iron required by the "enriched farina" standard (318 U. S. at 224).

[42] 21 C. F. R., 1940 Supp., 18.520, 18.525. Petitioners state in their brief (p. 14, footnote) that copies of the order of the Secretary of Agriculture establishing these identity standards have been filed with the Clerk of the Court.

[43] 21 C. F. R., 1940 Supp., 18.520 (a) (2), (b), 18.525.

is not milk fat the quantity thereof added is not more than 0.01 percent of the weight" of the finished product.". By the proviso against the use in an appreciable quantity of a vitamin concentrate consisting of an oil other than milk fat, the standard both preserves the integrity of the finished product as a milk product, and gives effect to the natural affinity that exists between vitamin D and milk—an affinity which arises from the fact that the principal function of vitamin D is to aid in the metabolism of calcium, and the further fact that the most satisfactory source of an assimilable form of calcium is milk. See *Federal Security Adm'r v. Quaker Oats Co.*, 318 U. S. at 225, 234.

The label thereunder Carolene is sold (R. 17) represents that a 14½ ounce can contains not less than 2,000 U. S. P. Units of vitamin A and not less than 400 U. S. P. Units of vitamin D. We do not suggest that this representation is false. It is, we believe, misleading by virtue of the very fact of its truth. For it gives to Carolene the benefit of a representation of vitamin enrichment that ordinary condensed or evaporated whole milk is not allowed to carry, and of such enrichment in a quantity that not even condensed or evaporated whole milk "With Increased Vitamin D Content" is required to possess. The uninformed consumer can hardly avoid the impression from

* 21 C. F. R., 1940 Supp., 18.520 (a) (2), (c) (4), 18.525.

the label that Carolene is a product superior to condensed or evaporated whole milk, and that it is a "short-cut to a balanced diet" of the type that has led to the standardization of vitamin enrichment which was sustained in the *Quaker Oats* case. And the consumer is given this impression despite the fact that the artificial vitamin fortification of Carolene does not preserve the natural affinity between milk fat and vitamin D on which the condensed and evaporated milk standards are based.[*]

Petitioners do not now contend that the Filled Milk Act is invalid as applied to filled milk not artificially fortified, and they cannot do so, for this Court has already sustained the congressional finding that the sale of filled milk "constitutes a fraud upon the public." This finding may not, we submit, be circumvented merely by a showing that Carolene is now fortified artificially to a point of vitamin equivalence to or excess over

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[*] In this connection it may be noted that although petitioners' case is in large part predicated upon the identity of their product with whole milk in food value, their own evidence shows that Carolene's enrichment of vitamin D greatly exceeds the amount of that element found in milk. Petitioners' expert witness Dr. Carlson so testified (R. 207). Excess of vitamin D may under some circumstances even be harmful (R. 188); and though it be assumed, as Dr. Carlson testified (R. 189), that the excess here involved is not great enough to be dangerous to health, the excess is still sufficient to emphasize the disparity between Carolene and milk. The purchaser may be getting more of some things than milk would give him, but he is not getting milk.

whole milk. A product that is not otherwise a legitimate article of commerce can hardly become one by virtue of artificial features the truthful representation of which serves only to mislead and to add to, rather than to avoid or mitigate, the potentialities of consumer confusion, misunderstanding, and deception that induced the congressional proscription of the original article.

From this conclusion it does not follow, as asserted by Mr. Justice Field dissenting in *Powell v. Pennsylvania*, 127 U. S. 678, 698, that "there is no fabric or product, the texture or ingredients of which the legislature may not prescribe by inhibiting the manufacture and sale of all similar articles not composed of the same materials." Nor do we contend, as petitioners suggest (Br., p. 30), that the manufacture, sale, or shipment of any article can be prohibited "merely because of similarity to another product in looks and taste." Filled milk is not a non-milk product which simply happens to look like and serve the same purposes as whole milk. Instead, it is itself a milk product, retaining more than 90 percent of the constituents of whole milk but with the most valuable constituent abstracted; and in the place of that constituent a less expensive ingredient is substituted for no other apparent purpose than to make the residual skimmed milk look like the original whole milk and thereby to enable it to command a comparable price. This does not rep-

resent the ordinary competition of one product with another. Instead, it represents the economic adulteration of a well-known natural product, and the competition of the product in its adulterated form with the same product in its natural form. Carolene is milk economically adulterated,[46] and prepared and sold under circumstances inevitably entailing danger of consumer confusion, misunderstanding, and deception. We submit that the legislative power extends to prohibiting the interstate shipment of such a product. The arguments supporting the claim that such a prohibition invades due process were fully anticipated by Mr. Justice Field and were rejected by this Court in

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[46] *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, upon which petitioners rely (Br., pp. 23, 30, 33), involved no question of adulteration, imitation, or semblance, and did not involve a food product. There a Pennsylvania statute prohibited the use of "shoddy" (clippings left in the process of garment manufacture) in quilts and comfortables, but allowed the use of second-hand material if adequately disinfected. It stood admitted that "shoddy" could be as completely disinfected as second-hand material, and, since the only purpose of the statute was sanitation, the absolute prohibition of the use of "shoddy" was held to be without rational basis. If the only basis of the Filled Milk Act were a congressional finding that coconut and cottonseed oil were produced under unsanitary conditions, and the proof showed conclusively that the process of refining completely remedied this defect, the *Weaver* case might here be pertinent; but it has no pertinence whatever to the question of the validity of the Filled Milk Act as a measure designed to protect the public from the confusion, misunderstanding, and deception that attend the marketing of an economically adulterated article.

Powell v. *Pennsylvania*, 127 U. S. 678. We see no reason why they should not similarly be rejected now.

CONCLUSION

The Filled Milk Act validly applies to Carolene, irrespective of its alleged wholesomeness and equivalence to whole milk in vitamin content and food value. Petitioners' proffered evidence was properly rejected as irrelevant. The decision of the court below should therefore be affirmed.

Respectfully submitted.

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